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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LUIS ANDRES ESQUIVEL-BERRIOS,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner, a Nicaraguan national, fled his country in 1985 at the age of twelve to avoid forced conscription into the military. He arrived in the United States and sought political asylum in 1988. The Board of Immigration Appeals took "administrative notice" that the intervening election of Violeta Chamorro as President of Nicaragua eliminated any well-founded fears of persecution that petitioner might have, and on that basis denied his asylum petition. The Board gave petitioner no opportunity to present evidence concerning the effect of the Chamorro election on his fear of persecution. The United States Court of Appeals for the Seventh Circuit affirmed.

The questions presented are:

1. Whether respondent violated petitioner's rights under the Due Process Clause of the Fifth Amendment by denying his asylum claim based solely upon administrative notice of adjudicative facts without prior notice and without giving petitioner the opportunity to present contrary evidence.

2. Whether 28 U.S.C. § 2347(c), which authorizes courts of appeals to order agencies to consider newly-adduced evidence, is rendered inapplicable by the existence of discretionary reopening mechanisms available at the agency level.

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PETITION FOR A WRIT OF CERTIORARI

Luis Andres Esquivel-Berrios respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit, as modified on denial of rehearing (App. 1a-21a, *infra*), is reported at 971 F.2d 26. The decision of the United States Board of Immigration Appeals (App. 22a-26a, *infra*) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1992. A timely petition for rehearing with suggestion of rehearing *en banc* was filed by petitioner on September 15, 1992. The court of appeals modified its judgment and denied the petition on November 4, 1992. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides, in pertinent part, that "No person shall be * * * deprived of life, liberty, or property, without due process of law." 28 U.S.C. § 2347(c) is reprinted at page 31a of the Appendix to this petition.

STATEMENT

In this case, the United States Court of Appeals for the Seventh Circuit upheld the determination by the Board of Immigration Appeals ("Board") that petitioner no longer had a well-founded fear of persecution were he to return to his native Nicaragua. That determination was based entirely on the Board's "administrative notice" that a change in the government of Nicaragua removed any basis for petitioner's fear of persecution. The Board did not give petitioner any notice that it intended to take "administrative notice" of the effect of the change in government, and did not give petitioner any opportunity to present evidence demonstrating that the change in government did not eliminate Sandinista control of the Nicaraguan military and security forces and thus did not remove the basis for his fear of persecution.

The Seventh Circuit's decision that petitioner's due process rights were not violated by the Board's use of official notice and the lack of any opportunity for petitioner to rebut the

noticed "facts" follows similar decisions by the District of Columbia Circuit and the Fifth Circuit, but is directly contrary to decisions of the Sixth Circuit and the Ninth Circuit.[1] This Court should grant the petition to resolve this conflict among the circuits on this important issue.

A. Petitioner's Background. Petitioner Luis Esquivel-Berrios was born in Chinandega, Nicaragua in 1971. In February, 1985, at the age of thirteen, he fled Nicaragua and left behind his family out of fear that he would be forcibly conscripted into military service by the Sandinista government. Shortly before his escape, the Sandinistas conducted a raid on petitioner's village in which more than 3,000 children and young adults (8% of the village's population) were kidnapped and forced into military service against their will.[2] Petitioner testified that children of his age and size were particularly at risk of being kidnapped.[3]

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[1] See *Immigration Board's Administrative Notice Of Sandinista Ouster Yields Circuit Split*, 61 USLW 1023 (Aug. 18, 1992) (noting conflict among the circuits following ruling below); 69 INTERPRETER RELEASES 1213 (Sept. 28, 1992) (same).

[2] This raid was specifically described in the State Department's *Country Reports for 1984* (published in February, 1985), a copy of which was contained in the record. See Joint Comm. on Foreign Affairs, *Country Reports on Human Rights Practices for 1984*, S. Prt. No. 6, 99th Cong., 1st Sess. 615 (1985).

[3] It was undisputed below that such forced conscription by the Sandinistas constituted a violation of international law, including Article 4(3)(c) of Protocol II to the Geneva Convention Relating To The Protection Of Victims Of Non-International Armed Conflicts, 16 I.L.M. 1442, 1444 (1977), and Article 38 of the United Nations Convention on the Rights of the Child, 28 I.L.M. 1448, 1470 (1989).

Petitioner fled to Guatemala where he remained for more than three years while living with an older brother. He eventually lost his permission to remain in Guatemala and, fearing deportation back to Nicaragua, entered the United States without inspection and was immediately arrested on or about July 21, 1988. Upon his arrest, petitioner conceded deportability and applied for political asylum citing his fear of reprisals by the Sandinista military and his opposition to the Sandinista party. Through the time of his arrest, the State Department continued to acknowledge the forced conscription of minors by the Sandinista military and the disappearance of those who refused to serve.[4]

B. Asylum Proceedings And The Chamorro Election. The Immigration Judge found petitioner's testimony concerning his experiences and fears of persecution to be credible. Nevertheless, the judge denied petitioner's asylum claim citing the absence of sufficient corroborating evidence. The judge ruled, however, that he would not consider any evidence contained in the State Department's *Country Reports* even though such reports had been placed into the record and specifically corroborated petitioner's testimony.

On April 25, 1990, during the pendency of petitioner's appeal to the Board and after all briefing was completed, Violeta Chamorro defeated the Sandinistas in a general election and was elected President of Nicaragua. The State Department, however, was quick to point out that the Sandinistas retained much of their official control of the government and that the same Sandinista officials who controlled the military and

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[4] See, *e.g.*, Joint Comm. on Foreign Affairs, *Country Reports on Human Rights Practices for 1988*, S. Prt. No. 3, 101st Cong., 1st Sess. 645 (1989).

security forces in 1985 remained in power.[5] Recently, the Senate Foreign Relations Committee also noted that Sandinista control of the government is growing and that the Sandinista military continues to perpetrate human rights atrocities and persecute its opponents.[6]

On January 17, 1991, the Board dismissed petitioner's appeal based entirely upon its officially noticed assumption that the Chamorro election had necessarily eliminated any well-founded fear of persecution that petitioner might have. In doing so, the Board utilized the following boilerplate language that it has used to dismiss virtually all Nicaraguan asylum petitions:

> [W]e take administrative notice that the Sandinista party no longer controls the Nicaraguan government. Effective April 25, 1990, a new coalition government, formed by parties in

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[5] See Joint Comm. on Foreign Affairs, *Country Reports on Human Rights Practices for 1990*, S. Prt. No. 5, 102d Cong, 1st Sess. 701 (1991) ("The military and police continued to be controlled by Sandinistas in 1990 despite the change in administration. In transition accords signed between the new Government and outgoing Sandinista leaders, Humberto Ortega [brother of former President Daniel Ortega] was designated to remain as head of the Nicaraguan armed forces . . . . Ortega retains almost complete autonomy in the conduct of military affairs. Rene Vivas, also a Sandinista, remained as head of the police").

[6] See Sen. Comm. on Foreign Relations, *Nicaragua Today*, Comm. Prt. 102, 102d Cong., 2d Sess. 1-6, 35-49, 79-95 (Aug. 1992). Among its "Key Findings," the Foreign Relations Committee concluded that "President Chamorro is the titular head of state in Nicaragua. The country is actually controlled by General Humberto Ortega, and the Sandinista National Liberation Front," and that "[h]uman rights abuses are rampant in Nicaragua. Typical examples are the murder of Nicaraguan Resistance Commander, Enrique Bermúdez, the torture of Resistance leader Aristides Sánchez, the murder of Jean Paul Genie [a sixteen year old boy who returned to Nicaragua after fleeing conscription], the assassination, torture, and harassment of thousands of former Resistance combatants . . ." *Id.* at ix-x.

> opposition to the Sandinistas ("UNO"), has succeeded the former government of the Sandinista party following national elections and the inauguration of Violeta Chamorro as the new president. Further, the new president of Nicaragua has announced a general amnesty covering the hostilities between the former Contra resistance and the Nicaraguan government and an end to military conscription. Given that the Sandinista party no longer governs Nicaragua, under the present circumstances we do not find that the record now before us supports a finding that the respondent has a well-founded fear of persecution by the Sandinista government were he to return to Nicaragua.

App. 23a-24a, *infra*. The Board did not address petitioner's evidence concerning his fears of persecution by the Sandinista military. In fact, the Board's opinion contained no discussion *at all* concerning petitioner's specific asylum claim. Instead, because of its officially noticed findings concerning the impact of the Chamorro election, the Board simply held that petitioner's evidence of persecution was inconsequential: "even if one were to assume that the respondent's previous experiences in Nicaragua amounted to past persecution, or that at the time he left and for some time thereafter he had a well-founded fear of persecution should he return, it is not established that he presently merits a grant of asylum." App. 24a, *infra*.

C. Proceedings In The Court Of Appeals. On March 14, 1991, petitioner filed a timely petition for review in the Court of Appeals for the Seventh Circuit seeking to reverse the Board's ruling on the grounds that it violated his rights under the Due Process Clause and because the Board's officially noticed findings were not supported by substantial evidence. Alternatively, pursuant to 28 U.S.C. § 2347(c), petitioner sought an order vacating the Board's ruling and remanding for consideration of newly-adduced evidence which petitioner sought to offer to rebut the Board's findings. Petitioner argued that he had reasonable grounds for not presenting this evidence

to the Board because the Chamorro election did not occur until after briefing at the Board had concluded and because he was given no warning by the Board that it would rely upon matters outside the record.

On August 4, 1992, the court of appeals, while acknowledging the seriousness of petitioner's constitutional objections to the Board's decision, nevertheless rejected each of his contentions. The court initially noted its concern over the "cloud cast over the Board's decision by its use of boilerplate paragraphs in describing the salient factors involved in its determination." App. 18a, *infra*. The court then cited the absence of any "detailed description of Berrios' testimony" and its concern that it was not "immediately apparent that the Board considered Berrios' evidence at all." *Ibid.* The court also acknowledged that "the Board did not discuss the relationship between the change in the Nicaraguan government and Berrios' particular claims." *Ibid.*

Despite each of these deficiencies in the Board's decision, the court held that "the Board's consideration of Berrios' case was not so inadequate as to amount to a denial of due process" because one sentence in the decision "indicates that the Board was aware of Berrios' specific claim." App. 18a, *infra*. The court did not hold the Board's officially noticed findings to be supported by substantial evidence. Instead, it affirmed the Board's decision based upon the mere holding that the evidence cited by the Board "tends to support a conclusion that Berrios no longer had a well-founded fear of persecution." *Id.* at 19a n.12.

Finally, the court denied petitioner's motion pursuant to 28 U.S.C. § 2347(c) on the grounds that such relief was inapplicable given the availability of discretionary reopening mechanisms at the Board. App. 16a-17a, 19a, *infra*. While the court agreed with petitioner that he "has a due process right to

have [his] evidence considered," *id.* at 19a, the court assumed that such evidence would be considered by the Board through a motion to reopen. It also assumed that even though a motion to reopen would not stay petitioner's deportation, the Board would act in good faith and not deport petitioner until such a motion was resolved (although respondent's counsel refused to provide such assurances during oral argument in the court of appeals).

On September 15, 1992, petitioner filed a petition for rehearing and suggestion of rehearing *en banc*, citing primarily the conflict created by the court's decision with recent rulings of the Sixth and Ninth Circuits. While acknowledging the conflict concerning each of its holdings (App. 14a, 17a n.9, *infra*), the court denied the petition for rehearing on November 4, 1992. On December 4, 1992, the court of appeals stayed execution of its judgment enforcing the administrative order of the Board pending disposition of the petition to this Court.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's decision on the constitutional limits and uses of official notice, including its holding that due process does not guarantee an opportunity to rebut officially noticed findings, conflicts with decisions of several other circuits and cannot be reconciled with due process decisions of this Court. In addition, the Seventh Circuit's ruling on the applicability of 28 U.S.C. § 2347(c) also presents a question over which the courts of appeals are in conflict. These issues are certain to recur given the broad applicability of the court's decision to virtually all forms of agency adjudication. This Court should grant the petition to resolve these conflicts among the circuits.

I. THE COURT OF APPEALS' DECISION THAT THE BOARD DID NOT VIOLATE THE DUE PROCESS CLAUSE CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS AND CANNOT BE RECONCILED WITH THIS COURT'S DUE PROCESS DECISIONS

The court of appeals' decision in this case raises fundamental questions concerning the constitutional limits of official notice and the due process safeguards that must be observed when such notice is taken by an agency. It also calls into question the role, if any, that agency reopening mechanisms may play in providing these safeguards. On each of these fundamental questions, the courts of appeals are hopelessly in conflict and in need of guidance from this Court.

A. The Court Of Appeals' Ruling Conflicts With Rulings Of Other Circuits That The Board May Not Base A Decision On Official Notice Without Warning And An Opportunity To Present Contrary Evidence

The court of appeals held that the Board may constitutionally deny an asylum application based solely upon official notice of changed political circumstances in the alien's country of origin. App. 18a-19a, *infra*. In other words, the Board may take official notice that an alien no longer possesses the well-founded fear of persecution required by 8 U.S.C. § 1158(a) to merit a grant of asylum.[7] Most significantly, however, the

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[7] Although not presented for review, this holding cannot be squared with the rule that official notice not be used to resolve ultimate issues in a case, particularly those which involve the petitioner's state of mind. See, *e.g.*, *Standard-Vacuum Oil Co. v. United States*, 339 U.S. 157, 159-60 (1950) ("certainly a court could not know judicially the facts of petitioner's information or lack of information"); *Board of Education v. Allen*, 392 U.S. 236, 248 (1968) (refusing to take judicial notice of whether materials used in parochial schools are used solely to teach religion); *Witherspoon v. Illinois*, 391 U.S. 510, 517-18 (1968) (refusing to take judicial notice that exclusion

court also held that the Board could take official notice without warning to the alien and without guaranteeing him the opportunity to present rebuttal evidence. App. 18a-19a, *infra*. In reaching this holding, the court of appeals fully acknowledged the conflict among the circuits on this question. *Id.* at 14a. Indeed, when faced with this conflict on rehearing, the court cited but made no attempt to reconcile it. *Ibid.*

The court of appeals based much of its reasoning on earlier decisions of the District of Columbia Circuit in *Gutierrez-Rogue v. I.N.S.*, 954 F.2d 769 (1992), and the Fifth Circuit in *Rivera-Cruz v. I.N.S.*, 948 F.2d 723 (1991). In each of these cases, the courts upheld the ability of the Board to deny Nicaraguan asylum applications based solely on official notice as to the impact of the Chamorro election. These decisions, however, irreconcilably conflict with rulings of the Ninth Circuit in *Castillo-Villagra v. I.N.S.*, 972 F.2d 1017 (1992), and the Sixth Circuit in *Ulloa v. I.N.S.*, 944 F.2d 905 (1991) (Table), at App. 27a-30a, *infra*, which held that the Board's boilerplate use of officially noticed findings concerning the election violated the Due Process Clause, both because of the absence of any warning to the petitioner and the failure to provide the petitioner an opportunity to present evidence rebutting those findings.[8]

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of jurors opposed to capital punishment increases risk of conviction); *Evans v. Newton*, 382 U.S. 296, 301 (1966) (refusing to take judicial notice of whether park was public or private in character). See also generally *Brown v. Piper*, 91 U.S. 37, 42-43 (1875) ("[c]ourts will take notice of whatever is generally known within its limits of their jurisdiction. . . . This power is to be exercised by courts with caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt upon the subject should be resolved promptly in the negative").

[8] The court's decision to uphold the Board's ruling even though it "did not discuss the relationship between the change in the Nicaraguan government and Berrios' particular claims," App. 18a, *infra*, also is unprecedented.

The issue presented is *not* whether the Board may take official notice in asylum cases of changed political circumstances. The power of agencies to take such official notice where the salient facts are commonly acknowledged and uncontroverted is well-recognized and an indispensable component of agency adjudication.[9] Instead, the question presented relates solely to the power of the Board to base a decision entirely on official notice of such issues without warning to the petitioner and without affording him or her the opportunity to present rebuttal evidence. The Board's abuse of its powers of official notice in such cases was well described by the Ninth Circuit in *Castillo-Villagra*:

> The facts of which the INS took notice in this case were in part legislative in nature. They included: (1) that Violeta Chamorro had been elected president, (2) that her non-Sandinista coalition had gained a majority in parliament, and (3) that the Sandinistas were ousted from power.

Indeed, it has been well-settled that the Board may not base a decision entirely on official notice without tying those facts to the specific circumstances of the asylum claim in each case. See, *e.g.*, *Montecino v. I.N.S.*, 915 F.2d 518, 521 n.1 (9th Cir. 1990) (Board violated Due Process Clause where decision was "the kind of perfunctory form letter that might be used by a department store dismissing a customer's mistaken complaint of an overcharge"); *Barraza Rivera v. I.N.S.*, 913 F.2d 1443, 1448 (9th Cir. 1990) (same); *Kaczmarczyk v. I.N.S.*, 933 F.2d 588, 594-95 (7th Cir.), *cert. denied*, 112 S.Ct. 583 (1991) (official notice not a "substitute for an analysis of the facts of each applicant's individual circumstances").

[9] See, *e.g.*, *Kaczmarczyk v. I.N.S.*, 933 F.2d 588, 594 (7th Cir. 1991) (recognizing power of board to take official notice of "uncontroverted facts concerning political conditions in asylum seekers' home countries"); *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 358 n.8 (C.D. Cal. 1982) ("[t]he Court's power to take judicial notice of grave conditions in other countries where all pertinent reports disclose similar accounts is well-established"). See also generally 3 K. Davis, ADMINISTRATIVE LAW TREATISE § 15:18, at 200 (2d ed. 1980) (same).

> The facts were also in part adjudicative, that [petitioners] had nothing more to fear from the Sandinistas. The first two facts are plainly legislative and not debatable. It would be a waste of time to allow evidence regarding them. The third legislative fact, that the Sandinistas were ousted from power, was debatable, since the Sandinistas retained power over the police and the military. The adjudicative fact required both a debatable assumption about the amount of power retained by the Sandinistas, and an assumption about the particular salience [to the petitioners].

Castillo-Villagra, 972 F.2d at 1027.

As this case and *Castillo* demonstrate, there exists a fundamental conflict among the circuits regarding the Board's duty to warn of its intention to base a decision entirely on official notice and to guarantee the petitioner an opportunity to offer rebuttal evidence. In this case, the court of appeals held that due process requires neither of these safeguards and is satisfied by the petitioner's ability to seek discretionary reopening remedies at the Board. App. 14a-15a, 18a, *infra*. Accord *Gutierrez-Rogue v. I.N.S.*, 954 F.2d 769 (D.C. Cir. 1991); *Rivera-Cruz v. I.N.S.*, 948 F.2d 962 (5th Cir. 1992). This holding, however, squarely conflicts with decisions of other circuits and cannot be reconciled with this Court's due process jurisprudence.

It is well established that aliens are fully entitled to the protections of the Due Process Clause of the Fifth Amendment, including the right to notice and an opportunity to present evidence in deportation proceedings. *Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982); *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950). In construing the Due Process Clause, this Court has warned that agencies may not decide matters solely through official notice of facts outside the record without warning to the parties. In *Ohio Bell Telephone Co. v. Public Utilities Comm'n*, 301 U.S. 292 (1937), this Court, following a long

line of rulings by this Court concerning the constitutional limits of official notice[10], held that plenary use of officially noticed findings by an agency without warning to the parties violates the Due Process Clause. In *Ohio Bell*, the agency adjudicated the parties' claims by taking official notice of key disputed facts in the case "[w]ithout warning or even the hint of warning that the case would be considered or determined upon any other basis than the evidence submitted." *Id.* at 300. This Court struck down such use of official notice, holding that "[t]his is not the fair hearing essential to due process. It is condemnation without trial." *Ibid.*

The constitutional rule which has evolved from *Ohio Bell* and its predecessors was summarized in *Bowman Transp. v. Arkansas-Best Freight System*, 419 U.S. 281 (1974):

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[10] See, *e.g.*, *United States v. Abilene & So. Ry.*, 265 U.S. 274, 289 (1924) (Brandeis, J.) (official notice violated Due Process Clause because petitioners "were left without notice of the evidence with which they were, in fact, confronted, as later disclosed by the finding made. The requirement that in an adversary proceeding specific reference be made, is essential to the preservation of the substantial rights of the parties"); *The Chicago Junction Case*, 264 U.S. 258, 265 (1924) (Brandeis, J.) (same); *Interstate Commerce Comm'n v. Louisville & Nashville R.R.*, 227 U.S. 88, 93 (1913) ("[a]ll parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense"); *United States v. B. & O. Southwestern Ry.*, 226 U.S. 14, 20 (1912) (Holmes, J.) ("[i]t would be a very strong proposition to say that the parties were bound in the higher courts by a finding based on specific investigations made in the case without notice to them"); *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 312 (1903) ("the right of a court to act upon what is in point of fact known to it must be subordinate to those requirements of form and orderly communication which regulate the mode of bringing controversies into court, and of stating and conducting them").

> A party is entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it. Indeed, *the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation.*

Id. at 288 n.4 (emphasis added), citing *Ohio Bell*, 301 U.S. at 300; *Abilene*, 265 U.S. at 289. *Cf. Heckler v. Campbell*, 461 U.S. 458, 469 (1983) ("when an agency takes official or administrative notice of facts, a litigant must be given an adequate opportunity to respond").

Following these decisions, the Sixth and Ninth Circuits have each held that where the Board bases a decision entirely on official notice, "it is essential that the parties be afforded an opportunity to present information 'which might bear upon the propriety of noticing the fact, or upon the truth of the matter to be noticed.'" *Castillo-Villagra*, 972 F.2d at 1028 (quoting *Banks v. Schweiker*, 654 F.2d 637, 641 (9th Cir. 1981)). Accord *Ulloa v. I.N.S.*, 944 F.2d 905 (6th Cir. 1991) (Table), at App. 29a-30a, *infra* ("We believe . . . notions of fairness require that the Board give aliens adequate notice and a meaningful opportunity to respond to officially noticed facts that bear upon the Board's decision-making process").[11] Thus, in

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[11] See also 3 K. Davis, ADMINISTRATIVE LAW TREATISE § 15:16, at 195-96 (2d ed. 1980) ("when [officially noticed] facts . . . could be reasonably challenged and they importantly affect the decision, giving the parties a pre-decision chance to respond to them may be an essential part of fair procedure"); Davis, *A System of Judicial Notice Based On Fairness and Convenience*, in PERSPECTIVES OF LAW 69, 76-77 (1964). *Cf.* Administrative Procedure Act, 5 U.S.C. § 556(e) (when agency rests decision on official notice, party must be given "on timely request . . . an opportunity to show the contrary"); Advisory Comm. Notes to FED. R. EVID. 201(e) ("[b]asic considerations of procedural fairness *demand* an opportunity to be heard on the propriety of taking judicial notice and the tenor of the matter

sharp conflict with the Fifth, Seventh and District of Columbia Circuits, these Courts have each specifically held in identical cases that the Board should have warned aliens of its intention to rely upon officially noticed findings concerning the Chamorro election as the basis for its decision and given them the opportunity to present rebuttal evidence:

> The agency should have warned that it would consider these facts even though they were not in existence at the time of the hearing and appellate briefs, so that the parties could have moved for leave to supplement their briefs, supplement the evidence, withdraw their applications for asylum, or seek other relief. The agency should also have warned, prior to final decision, that it intended to take notice that the Sandinistas were out of power, and that any well-founded fear of persecution the applicants might have had before the election could no longer be well founded, and then given the parties an opportunity to show cause why notice should not be taken of these propositions. . . . To deny an opportunity to be heard in these circumstances was a denial of Due Process required by the Fifth Amendment.

Castillo-Villagra, 972 F.2d at 1029.[12] Accord *Ulloa v. I.N.S.*, 944 F.2d 905 (6th Cir. 1991) (Table), at App. 30a, *infra* (vacating and remanding Board's decision "so that petitioner

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noticed. The rule *requires* the granting of that opportunity upon request") (emphasis added).

[12] See also 69 INTERPRETER RELEASES 1213, 1216 (Sept. 28, 1992) ("We find the approach in *Castillo-Villagra* to be the better one. . . . Given the high stakes involved in asylum cases, applicants should be afforded a hearing on the alleged political changes that the BIA takes notice of en route to denying an asylum claim. Political changes by themselves do not necessarily render an applicant's asylum application moot. As the State Department's *Country Reports* point out, the Sandinistas still retain considerable influence in the Nicaraguan security forces, and this is a factor that should be considered in the context of an individual's asylum claim").

may offer rebuttal evidence regarding the change of governments in Nicaragua and STAY[ing] the order of deportation until the evidence has been considered by the Board"). The procedural unfairness involved in this case strikes at the core of due process guarantees since "the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied." *Speiser v. Randall*, 357 U.S. 513, 520 (1958). What is more, it is readily apparent that the controversy concerning these fundamental issues cannot be reconciled without guidance from this Court.

B. The Court Of Appeals' Ruling Conflicts With Decisions Of Other Circuits Which Hold That Discretionary Reopening Mechanisms Are Insufficient To Satisfy Due Process Requirements

There is no dispute that aliens are constitutionally guaranteed the right to rebut officially noticed findings and "to have this evidence considered." App. 19a, *infra*. The court of appeals, however, like several other circuits, held that these constitutional guarantees are satisfied by the alien's ability to file a motion to reopen at the Board pursuant to 8 C.F.R. § 3.2. It is here that the circuits are again in conflict. Indeed, the court of appeals' holding on this point reflects a serious misunderstanding of the limited and discretionary nature of motions to reopen. Because of these characteristics, motions to reopen cannot provide any constitutional guarantees whatsoever.

The court of appeals' decision depends critically upon the assumption that the filing of motion to reopen before the Board "allow[s] asylum petitioners an opportunity to introduce evidence rebutting officially noticed facts." App. 14a, *infra*, quoting *Kaczmarczyk*, 933 F.2d at 597. Accord *Gutierrez-Rogue*, 954 F.2d at 773 (D.C. Cir. 1992); *Rivera-Cruz*, 948 F.2d at 968 (5th Cir. 1992). *Contra Castillo-Villagra*, 972

F.2d at 1029 (9th Cir. 1992); *Ulloa*, 944 F.2d 905 (6th Cir. 1991) (Table), at App. 30a n.1, *infra*. This conjecture depends in turn upon the incorrect presumption that aliens have a *right* to present evidence as part of a motion to reopen. In fact, as this Court explained recently in *I.N.S. v. Doherty*, 112 S. Ct. 719 (1992), the reopening mechanisms contained in 8 C.F.R. § 3.2 afford no such right.

Section 3.2 provides, in relevant part, that "[m]otions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing . . . ." The language of Section 3.2 reveals that a motion to reopen does not automatically entitle the movant to consideration of new evidence. To the contrary, it is framed in negative terms such that the Board is *never* absolutely required to reopen proceedings and consider new evidence:

> [Section 3.2] is framed negatively; it directs the Board not to reopen unless certain showings are made. It does not affirmatively require the Board to reopen the proceedings under any particular condition. Thus, the regulations may be construed to provide the Board with discretion in determining under what circumstances proceedings should be reopened.

I.N.S. v. Abudu, 485 U.S. 94, 105 (1988), quoting *I.N.S. v. Jong Ha Wang*, 450 U.S. 139, 144 n.5 (1981). Accord *Doherty*, 112 S. Ct. at 724 (same). In short, "the BIA has discretion to deny a motion to reopen even if the alien has made out a prima facie case for relief." *Abudu*, 485 U.S. at 105-106, citing *I.N.S. v. Rios-Pineda*, 471 U.S. 444, 449 (1985); *I.N.S. v. Phinpathya*, 464 U.S. 183, 188 n.6 (1984).

The Board need not consider newly adduced evidence at all before denying reopening. For example, the Board "may hold

that the movant has not established a prima facie case for the underlying substantive relief sought." *Abudu*, 485 U.S. at 104. The Board also "may leap ahead, as it were, over the two threshold concerns (prima facie case and new evidence/ reasonable explanation), and simply determine that even if they were met, the movant would not be entitled to the discretionary grant of relief." *Id.* at 105. Thus, the court of appeals' assumption that evidence offered to rebut officially noticed findings actually will be considered by the Board through a motion to reopen cannot be squared with this Court's rulings that the Board always retains the discretion to deny reopening regardless of the new evidence being presented.

The court of appeals' reliance on reopening mechanisms also cannot be reconciled with this Court's decisions because of the strong disfavor with which such motions are viewed. In *Abudu*, this Court explained that "[t]he appropriate analogy [for a motion to reopen] is a motion for a new trial in a criminal case on the basis of newly discovered evidence, as to which courts have uniformly held that the moving party bears a heavy burden." 485 U.S. at 110. Consequently, motions to reopen are highly disfavored:

> [m]otions for reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing, and motions for a new trial on the basis of newly discovered evidence. . . . This is especially true in a deportation proceeding where, as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.

Doherty, 112 S. Ct. at 724-25.

For these very reasons, the Sixth and Ninth Circuits have rejected the view of the Fifth, Seventh and District of Columbia Circuits that reopening mechanisms provide the sort of meaningful opportunity to be heard required by the Due Process

Clause. To begin, given petitioner's indisputable constitutional right to have his evidence considered by the Board, that right cannot be conditioned on his ability to convince the Board to reopen its proceedings. See *Bowman Transp. v. Arkansas-Best Freight System*, 419 U.S. 281, 288 n.4 (1974) ("the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation"). Indeed, "requiring a petitioner facing deportation to file a motion to reopen the proceedings in order to rebut officially noticed facts creates an unnecessary procedural hurdle for such a petitioner." *Ulloa*, at App. 30a n.1, *infra*. This is particularly so in cases such as this where the Board itself is solely responsible for the petitioner's predicament:

> Petitioner[] did not bypass the INS. The INS bypassed [him], by taking administrative notice of facts not at issue in the hearings. Usually in a motion to reopen, the movant seeks to inject new material, but in this case, the tribunal injected the new material after the hearing was over.

Castillo-Villagra, 972 F.2d at 1024.

In short, following *Abudu* and *Doherty*, it is clear that discretionary reopening mechanisms cannot provide a constitutionally adequate method of assuring that evidence offered to rebut officially noticed findings will be considered. As recognized by the Sixth and Ninth Circuits, if the Board denies the motion to reopen, petitioner's evidence will never be considered by the Board at all.

> The BIA decision was made on the basis of facts which were not the subject of the hearing before the IJ. *That means that, with respect to the facts which controlled the BIA decision, the petitioners have never had a hearing. The motion to reopen is discretionary. If it were denied, the petitioners would never obtain a hearing on the matters which were determinative for the BIA.* The effect of requiring a motion to reopen . . . may amount, in practical

> consequences, to denial of any hearing. . . . The alien does not have a right to reopen, only a right to ask for reopening, and the motion is disfavored and addressed to the discretion of the agency.

Castillo-Villagra, 972 F.2d at 1025 (emphasis added) (citing *Abudu* and *Doherty*).

Yet, even if one could assume that Board always would consider evidence offered to rebut officially noticed findings through a motion to reopen, that still would not reconcile the conflict concerning these issues. In *Milliken v. Bradley*, 433 U.S. 267, 280 (1977) (citation omitted), this Court held that remedies for constitutional violations must be "designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.'" Thus, where due process requires that a petitioner be afforded the opportunity to rebut officially noticed findings, his procedural interest must be "as fully protected as it would have been by introducing the noticed facts as a part of the evidence at the original hearing." K. Davis, ADMINISTRATIVE LAW TREATISE, § 15:18 at 201 (2d ed. 1980). Yet, a motion to reopen cannot place the alien in the same position he or she would have been in if the issues raised in the motion had been adjudicated originally.

Limiting the alien to reopening mechanisms places the alien at a substantial disadvantage because the filing of a motion to reopen does not stay the alien's deportation, leaving open "the possibility that unsuccessful asylum applicants may be ordered to leave the country before the Board has ruled on their motions to reopen." App. 17a n.11, *infra*, quoting *Kaczmarczyk*, 933 F.2d at 597. The Seventh Circuit addressed this problem by simply *assuming* that "when an asylum applicant uses a good faith motion to reopen to dispute officially noticed facts, the Board will exercise its discretion to stay the execution of its decision until it has had an opportunity to rule on the

applicant's motion." *Ibid.*, quoting *Kaczmarczyk*, 933 F.2d at 597. Accord *Gutierrez-Rogue*, 954 F.2d at 773 (adopting same presumption). The Ninth and Sixth Circuits, however, have correctly been unwilling to take this leap of faith:

> We are not satisfied that we can make this presumption, in view of the "broad discretion" the agency has to deny motions for rehearing, which are "disfavored."

Castillo-Villagra, 972 F.2d at 1030, quoting *Doherty*. Accord *Ulloa*, at App. 30a n.1, *infra* ("[t]he filing of a motion to reopen does not serve to stay the execution of an order of deportation . . . and thus such a procedure imposes the unreasonable risk that a petitioner may be deported before the Board considers the rebuttal evidence contained in his motion to reopen"). Applying the rule in *Milliken*, reopening mechanisms are therefore constitutionally insufficient because they cannot place the petitioner in the same position he would have been in had the Board properly provided him an opportunity to challenge its officially noticed findings at the outset.

In addition, allowing an alien to rebut the Board's officially noticed findings only through a motion to reopen would prevent the alien from having such findings tested through the more favorable substantial evidence standard of review that would otherwise be applicable. It is well-established that the grant or denial of asylum by the Board is reviewed through a "substantial evidence" standard. *I.N.S. v. Elias Zacarias*, 112 S. Ct. 812, 815 (1992). However, if evidence is presented for the first time through a motion to reopen, the Board is accorded the more deferential "abuse of discretion" standard of review given the disfavored nature of such motions. *Doherty*, 112 S. Ct. at 725; *Abudu*, 485 U.S. at 105.

In sum, the decision of the Seventh Circuit in this case, and those of the Fifth and District of Columbia Circuits reaching the same conclusion, conflicts with the decisions of the Sixth

Circuit and the Ninth Circuit and are contrary to the basic notions of due process outlined by this Court. It is readily apparent that reopening mechanisms alone cannot provide aliens the meaningful opportunity to rebut the Board's officially noticed findings guaranteed by the Due Process Clause. This Court has made clear that the Board cannot be absolutely required to reopen its proceedings under any circumstances. As such, the pervasive conflict on these issues can only be resolved through guidance from this Court.

II. THE COURT OF APPEALS' REFUSAL TO APPLY 28 U.S.C. § 2347 DISREGARDS THE PLAIN LANGUAGE OF THE STATUTE AND CONFLICTS WITH RULINGS OF OTHER COURTS OF APPEALS WHICH HAVE APPLIED IT ON REVIEW OF BOARD DECISIONS

In the court of appeals, petitioner sought reversal of the Board's decision because the officially noticed findings upon which it was based were not supported by substantial evidence and because the Board's decision violated petitioner's rights under the Due Process Clause. Alternatively, petitioner sought an order requiring the Board, pursuant to 28 U.S.C. § 2347(c)[13], to consider evidence which he offered to rebut the

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[13] 28 U.S.C. § 2347(c) provides, in pertinent part, as follows:

> "(c) If a party to a proceeding to review applies to the court of appeals in which the proceeding is pending for leave to adduce additional evidence and shows to the satisfaction of the court that--
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> (1) the additional evidence is material; and
>
> (2) there were reasonable grounds for failure to adduce the evidence before the agency;
>
> the court may order the additional evidence and any counter-evidence the opposite party desires to offer to be taken by the agency. The agency may modify its findings of fact, or make new findings, by reason of the additional evidence so taken, and

Board's findings. This remedy is expressly applicable on review of proceedings under the Immigration and Nationality Act. See, *e.g.*, *Osaghae v. I.N.S.*, 942 F.2d 1160, 1161-62 (7th Cir. 1991) ("The statute that empowers the courts of appeal to review decisions by the Board of Immigration Appeals, 8 U.S.C. § 1105a, states that such review is to be governed by 28 U.S.C. § 2347, subsection (c) of which empowers the court of appeals in appropriate cases to direct the agency to consider newly-discovered evidence"); *Martinez de Mendoza v. I.N.S.*, 567 F.2d 1222, 1225 (3d Cir. 1977) (same).

In its decision, the court of appeals reached the stunning conclusion that Section 2347(c) now is unavailable on review of Board decisions and is rendered inapplicable by the reopening mechanisms contained in 8 C.F.R. § 3.2. Although the court seemingly acknowledged the discretion afforded it by Section 2347(c) to order a remand to the Board, the court refused to apply the statute given the existence of the Board's reopening procedures:

> By its own terms. . . section 2347 apparently permits us, as a matter of discretion, to remand to an agency for new evidence when two conditions are met: that the additional evidence is material, and that there were reasonable grounds for failure to adduce the evidence before the agency. . . . *But whatever discretion we may have here we exercise in accordance with* Kaczmarczyk, *which found the reopening procedure to be an appropriate remedy for asylum petitioners seeking to rebut officially noticed facts.*

App. 16a-17a, *infra* (emphasis added). In defiance of Section 2347(c), the court did not consider the newly-adduced evidence offered by petitioner and made no determination as to whether he satisfied its requirements. *Id.* at 19a.

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may modify or set aside its order . . . ."

The Seventh Circuit's decision, while not unprecedented, disregards the plain statutory language of the Immigration and Nationality Act and Section 2347(c) and irreconcilably conflicts with decisions of other circuits which have applied Section 2347(c) on review of Board proceedings without regard to the reopening mechanisms available at the Board. In effect, the Seventh Circuit has now read Section 2347(c) out of existence as far as review of Board decisions is concerned.

Following the command of 8 U.S.C. § 1105a, most circuits have applied Section 2347(c) in deportation proceedings and have granted such relief where the statutory conditions were met. See, *e.g.*, *Dolores v. I.N.S.*, 772 F.2d 223, 226 (6th Cir. 1985) ("28 U.S.C. § 2347(c) authorizes Courts of Appeals, when reviewing agency final orders, to remand a case to the agency for consideration of additional evidence followed by new findings and another order. . . . We find that section 2347(c) is available on review of INS decisions"); *Coriolan v. I.N.S.*, 559 F.2d 993, 1003 (5th Cir. 1977); *Bernal-Garcia v. I.N.S.*, 852 F.2d 144 (5th Cir. 1988); *Martinez de Mendoza v. I.N.S.*, 567 F.2d 1222 (3d Cir. 1977). In these cases, Section 2347(c) relief was considered without *any* regard to the existence of reopening mechanisms at the Board. Indeed, the Seventh Circuit's holding that Section 2347(c) is rendered inapplicable by 8 C.F.R. § 3.2 was categorically rejected by the Tenth Circuit in *Becerra-Jimenez v. I.N.S.*, 829 F.2d 996 (1987):

> Section 3.2 sets forth procedures for cases where the motion to reopen is initiated with the BIA. Unlike § 2347(c), however, it does not address proceedings to review in a matter pending before a court of appeals. *Thus, § 3.2 cannot be construed to preempt § 2347(c) in a proceeding initiated, as here, in a court of appeals pending review.* Further, it has been held that a reviewing court has the inherent power to remand causes to administrative agencies

> for further proceedings to permit further evidence to be taken or additional findings to be made on essential points.

Id. at 1001-02 (emphasis added), citing *Ford Motor Co. v. Labor Board*, 305 U.S. 364 (1939). *Contra Ramirez-Gonzalez v. I.N.S.*, 695 F.2d 1208, 1213-14 (9th Cir. 1983) ("we will not compel the BIA to reopen [petitioner's] hearing on the basis of the new evidence he wishes to present. He must follow the INS regulations and file a motion to reopen with the BIA"). *Cf. Martinez de Mendoza*, 567 F.2d at 1226 n.9 (3d Cir. 1977) (ordering remand under Section 2347(c) even though no motion to reopen filed, but noting that "in normal circumstances a party asserting new and material evidence should, in the first instance, resort to the remedies available under 8 C.F.R. § 3.2, rather than invoking our power under § 2347(c))".

The cases cited above plainly reveal that the circuits are hopelessly in conflict about the proper role of Section 2347(c) in reviewing Board decisions. As such, guidance from this Court is critically necessary, particularly because the granting of petitioner's motion under Section 2347(c) would effectively cure the due process violations described earlier by placing him in the same position he would have been in if the Board had properly notified him of its intent to rely upon the Chamorro election as the basis for its decision.

III. THE QUESTIONS PRESENTED HAVE GREAT LEGAL AND PRACTICAL SIGNIFICANCE

The importance of the issues raised here extend far beyond the confines of this case and the context in which they arise. Indeed, ascertaining the constitutional limits and uses of official notice would pervasively affect all forms of agency adjudication. Similarly, whether discretionary reopening mechanisms can provide constitutionally adequate procedural safeguards carries broad significance for all cases in which an agency bases a decision upon officially noticed findings.

Finally, the proper role of Section 2347(c) in reviewing agency decisions has never been considered by this Court. The conflict over whether agency reopening mechanisms can preempt or limit the availability of relief in courts of appeals under Section 2347(c) is likewise applicable to review of all agency decisions over which Section 2347 would otherwise control. In short, these conflicts are both widely recognized and of great public significance. See, *e.g.*, *Immigration Board's Administrative Notice of Sandinista Ouster Yields Circuit Split*, 61 U.S.L.W. 1023 (Aug. 18, 1992); 69 INTERPRETER RELEASES 1213 (Sept. 28, 1992).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January, 1993

APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 91-1949
AGUSTIN RHOA-ZAMORA,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

Petition for Review from an Order of
the Board of Immigration Appeals
No. A 27 948 778

No. 91-1515
FELIPE ANTONIO JURESMA-ALTAMIRANO and
LUIS RODRIGUEZ-ALTAMIRANO,
Petitioners,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

Petition for Review from an Order of
the Board of Immigration Appeals
Nos. A 26 945 992 and A 26 945 993

No. 91-1551
LUIS ANDRES ESQUIVEL-BERRIOS,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

Petition for Review from an Order of
the Board of Immigration Appeals
No. A 28 578 493

ARGUED FEBRUARY 11, 1992--DECIDED AUGUST 4, 1992

Before CUDAHY and RIPPLE, *Circuit Judges*, and FAIRCHILD, *Senior Circuit Judge*.

CUDAHY, *Circuit Judge*. The petitioners in these consolidated appeals are Nicaraguan nationals who fled Nicaragua while the Sandinistas were in power and subsequently sought asylum in this country. All four petitioners were denied asylum by an Immigration Judge and appealed to the Board of Immigration Appeals (the Board). In each case, the Board took administrative notice that, as of April 1990, "the Sandinista party no longer controls the Nicaraguan government" and concluded that, "under the present circumstances," the record did not support a finding that the petitioner had "a well-founded fear of persecution by the Sandinista government were he to return to Nicaragua." Petitioners claim that the Board erred in finding that they did not have a well-founded fear of persecution because of the change in the Nicaraguan government. They also contend that the Board violated their

rights to due process by failing to accord each petitioner an individualized determination of his claim. In addition, petitioner Zamora argues that the Board deprived him of due process by failing to give him an opportunity to rebut the noticed facts. Petitioners therefore ask this court either to reverse the Board's decisions or to grant their motions to adduce additional evidence under 28 U.S.C. § 2347(c) and "remand these proceedings to the [Board] for further consideration" in light of that evidence.

I. FACTS

A. *Agustin Rhoa-Zamora*

Agustin Rhoa-Zamora entered the United States illegally on December 24, 1986. He was apprehended by the Immigration and Naturalization Service (INS) and charged with deportability under 8 U.S.C. § 1251(a)(2). Zamora conceded deportability, but requested asylum pursuant to 8 U.S.C. § 1158(a) and withholding of deportation pursuant to 8 U.S.C. § 1253(h). To be eligible for asylum, an alien must establish that he meets the statutory definition of "refugee," which requires him to show either past persecution or a "well-founded fear" of future persecution on account of race, religion, nationality, membership in a particular social group or political opinion. 8 U.S.C. § 1101(a)(42)(A). The decision whether to grant asylum to a statutorily eligible alien is within the discretion of the Attorney General. *INS v. Stevic*, 467 U.S. 407, 423 n.18 (1984). Withholding of deportation, by contrast, is mandatory if the applicant can meet the higher standard of showing a "clear probability" of persecution on account of one of these five grounds if he were returned to his country. *Id.* at 421 n.15.

At his deportation hearing, Zamora testified that he fled Nicaragua because of religious persecution directed at him and

his family. He claimed that he was an adherent of the Charismatic Catholic revival movement and described numerous incidents of Sandinista violence against him and other members of his faith. The Immigration Judge rejected Zamora's testimony as neither "candid" nor "credible" and concluded that Zamora had established neither a "clear probability that he would be subject to persecution upon return to Nicaragua" nor a well-founded, subjective fear of persecution. The judge therefore denied his application for asylum and ordered him to depart the country within two months.

Zamora appealed to the Board. While the appeal was pending, national elections were held in Nicaragua and a new coalition government made up of parties opposed to the Sandinistas was voted into office. On January 31, 1991, the Board issued a written opinion dismissing Zamora's appeal. Without prior notice to Zamora, the Board took administrative notice of the change in government in Nicaragua and concluded that, since the Sandinista party no longer governs Nicaragua, Zamora did not have a well-founded fear of persecution by the Sandinista government should he return. The Board ordered Zamora to depart within thirty days.

On April 25, 1991, Zamora filed with the Board a motion to reopen the proceeding pursuant to 8 C.F.R. § 3.2.[1] In

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[1] Zamora describes this motion as a "motion to reconsider." 8 C.F.R. § 3.2 provides for both motions to reconsider and motions to reopen. 8 C.F.R. § 3.8 prescribes the form for each type of motion as follows:

> Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material. Motions to reconsider shall state the reasons upon which the motion is based and shall be supported by such precedent decisions as are pertinent.

support of his motion, Zamora submitted various materials allegedly evincing the Sandinistas' continuing ability to persecute him. The Board has not, to this date, ruled on the motion. On April 26, 1991, Zamora filed a petition for review of the Board's order in this court. The Board certified the administrative record and relinquished it to this court for purposes of that appeal.

B. *Luis Esquivel-Berrios*

Luis Esquivel-Berrios fled Nicaragua in February of 1985 at the age of thirteen. He went first to Honduras and then to Guatemala, where he remained for three and one-half years before entering the United States in July of 1988. On July 21, 1988, Berrios was arrested by the INS and charged with deportability. Like Zamora, Berrios conceded deportability but sought either asylum or withholding of deportation.

At his hearing, Berrios testified that he had left Nicaragua because he feared being forcibly conscripted into military service by the Sandinista government. He testified that in February of 1985 it was common in his village for twelve- and thirteen-year-old boys to be taken into military service, and that he personally knew of other twelve- and thirteen-year-old boys who had been kidnapped and conscripted. Berrios also testified that he was politically opposed to the Sandinista government, and that he remains a conscientious objector to any form of military service in light of his firmly-held religious and moral

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We think it clear that Zamora's motion is more accurately characterized as a motion to reopen than as a motion to reconsider, and we will therefore treat it as such throughout this opinion.

In a filing with this court dated October 26, 1992, Zamora's counsel has provided a decision by the Board, dated September 23, 1992, about two pages in length, denying Zamora's motion.

beliefs. He testified that he believed that if he were returned to Nicaragua he would be either shot or jailed by the Sandinista government because of his decision to avoid conscription.

The Immigration Judge found that Berrios' testimony was credible, but nonetheless concluded that Berrios had not met his burden of showing that he was eligible for asylum or withholding of deportation. The judge noted that the Board of Immigration Appeals has long adhered to the position that "it is not persecution for a country to require military service of its citizens." Although there are exceptions to this rule, the judge concluded that his case did not fit within any such exception. He found no objective evidence of record that Nicaragua recruits twelve- or thirteen-year-olds into military service. Further, the judge noted that Berrios could certainly be required to serve in the Nicaraguan military if returned there at present, and could be convicted of a crime and jailed if he refused to do so. Finally, the judge found no objective evidence that Berrios would receive disproportionate treatment for his previous decision to avoid conscription. The Immigration Judge therefore denied Berrios' application for asylum or withholding of deportation and ordered that he be deported. The Board affirmed this decision based on the April 1990 change of government in Nicaragua, again without prior notice to the petitioner. Berrios did not file a motion to reopen or reconsider but appealed directly to this court.

C. *Felipe Antonio Juresma-Altamirano and Luis Rodriguez-Altamirano*

Half-brothers Felipe Antonio Juresma-Altamirano and Luis Rodriguez-Altamirano (the Altamiranos or the Altamirano brothers) entered the United States illegally on October 26, 1983. They were arrested by INS officials four days later and charged with deportability. Like the other petitioners in this

case, the Altamiranos conceded deportability but sought asylum and withholding of deportation.

The Altamiranos testified before the Immigration Judge that they fled Nicaragua in order to avoid recruitment into the Sandinista army. They testified that they are Pentecostal Christians, as are the other members of their family, and that the Pentecostal religion forbids its members to participate in any service requiring the carrying of arms.[2] The brothers also described various threats of persecution made against them for adhering to their religious convictions, including statements by military authorities that they would be imprisoned for at least five years if they refused to serve in the military.

The Immigration Judge accepted the brothers' testimony, but found that they had not established a well-founded fear of persecution based on their religious beliefs because they offered no evidence that they had ever requested exemption from military service based on those beliefs.[3] The judge also noted that the brothers did not claim religious persecution, in general,

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[2] Although it is not relevant to our decision here, we note that the Supreme Court has recently cast considerable doubt on whether these allegations, even if true, can support a well-founded fear of persecution on account of religion. In *INS v. Elias-Zacarias*, 112 S. Ct. 812 (1992), the Court held that a guerrilla organization's attempt to conscript the asylum applicant into its military forces does not necessarily constitute persecution on account of political opinion. Based on that decision, the Court vacated and remanded the Ninth Circuit's decision in *Canas-Segovia v. INS*, 902 F.2d 717 (9th Cir. 1990), which held, *inter alia*, that petitioners who would be imprisoned in their native country for refusing to serve in the military based on their religious beliefs had established a "clear probability of persecution on account of religious beliefs." 902 F.2d at 717, vacated and remanded, *INS v. Canas-Segovia*, 112 S. Ct. 1152 (1992).

[3] In fact, Luis testified that he had served in the Nicaraguan army in 1980 and 1981, although he had been a Pentecostal Christian all of his life.

by the Sandinistas. The judge concluded that the brothers had failed to establish that they would be singled out or systematically persecuted because of their religious beliefs. He therefore denied their applications for asylum or withholding of deportation and granted voluntary departure. The Board affirmed this decision based on the intervening change of government in Nicaragua, without prior notice to the Altamiranos, and ordered the brothers to depart within thirty days. The Altamiranos did not file a motion to reopen or reconsider but appealed directly to this court.

II. ANALYSIS

A. *Agustin Rhoa-Zamora*

1. *Jurisdiction*

The INS argues that this court has no jurisdiction over Zamora's petition because his motion to reopen is still pending before the Board, so that he has failed to exhaust his administrative remedies as required by 8 U.S.C. § 1105a(c). In support of this position, the INS cites the Sixth Circuit's decision in *Dokic v. INS*, 899 F.2d 530 (6th Cir. 1990). In *Dokic*, the court held that an applicant for asylum cannot obtain judicial review of an order of deportation until he has exhausted his administrative remedies "by filing a motion to reopen." *Id.* at 532. Presumably, this rule would also require the petitioner to wait until the motion was denied before seeking appellate review of the Board's order.

We disagree with the Sixth Circuit's interpretation of the exhaustion requirement. Section 1105a(c) provides:

> An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him

> *as of right* under the immigration laws and regulations. . . .

(emphasis added). As Zamora points out, reopening is a discretionary remedy, not one available as of right. *INS v. John Ha Wang*, 450 U.S. 139, 143 (1981); Note, *Timeliness of Petitions for Judicial Review Under Section 106(a) of the Immigration and Nationality Act*, 86 Mich. L. Rev. 990, 1011 (1988). Further, it would be a waste of time and administrative resources to require petitioners to file a motion to reopen in those cases, such as *Dokic* itself, in which they do not claim to have any new evidence, but wish to challenge the Board's decision on the existing administrative record. Such a rule is therefore contrary to the strong policy interest in preventing the use of frivolous motions to reconsider or reopen in order to postpone the execution of deportation orders. *Pierre v. INS*, 932 F.2d 418, 421 (5th Cir. 1991); Note, *supra*, at 1012-13. This court has routinely reviewed Board decisions ordering deportation in cases where the petitioner did not file a motion to reopen. *See, e.g., Zulbeari v. INS*, 963 F.2d 999 (7th Cir. 1992); *Osaghae v. INS*, 942 F.2d 1160 (7th Cir. 1991); *Kaczmarczyk v. INS*, 933 F.2d 588 (7th Cir.), *cert. denied*, 112 S. Ct. 583 (1991). We see no reason to change that approach.

We are more concerned, however, with another jurisdictional issue that Zamora's pending motion to reopen creates. The Ninth and Eleventh Circuits hold that a motion to reopen deportation proceedings following the Board's affirmance of an immigration judge's deportation order renders the Board's decision nonfinal, and therefore nonappealable. *Fleary v. INS*, 950 F.2d 711 (11th Cir. 1992); *Chu v. INS*, 875 F.2d 777 (9th Cir. 1989); *Hyun Joon Chung v. INS*, 720 F.2d 1471, 1474 (9th Cir. 1983), *cert. denied*, 467 U.S. 1216 (1984). The Third Circuit, on the other hand, holds that a pending motion to reopen "does not render the order of

deportation nonfinal." *Alleyne v. INS*, 879 F.2d 1177, 1181 (3d Cir. 1989).

In administrative law generally, there appears to be a strong presumption that, with respect to judicial review, the filing of a motion to reopen or reconsider renders an agency's decision nonfinal for purpose of determining when the time to appeal begins to run. *Interstate Commerce Comm'n v. Locomotive Engineers*, 482 U.S. 270, 284-85 (1987); *Arch Mineral Corp. v. Director, Office of Workers' Compensation Programs*, 798 F.2d 215, 218 (7th Cir. 1986). The majority of courts follow this approach despite the Administrative Procedure Act's provision that agency action that is "otherwise final" is final for purposes of review "whether or not" a motion for reopening or reconsideration has been filed. 5 U.S.C. § 704. As the Supreme Court has noted, this provision "has long been construed . . . merely to relieve parties from the *requirement* of petitioning for rehearing before seeking judicial review . . . but not to prevent petitions for reconsideration that are actually filed from rendering the orders under reconsideration nonfinal." *Locomotive Engineers*, 482 U.S. at 284-85 (emphasis in original).[4] In *Locomotive Engineers*, the Court placed its imprimatur on this interpretation. *Id.*

In the wake of *Locomotive Engineers*, several circuits have taken the next logical step of holding that if the filing of a motion to reopen renders an agency decision nonfinal for purposes of determining the time for appeal, it must also render that decision nonfinal for purposes of appellate jurisdiction. *See United Transp. Union v. Interstate Commerce Comm'n*, 871

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[4] The legislative history of section 704 supports this interpretation. *See West Penn Power Co. v. Environmental Protection Agency*, 860 F.2d 581, 585 (3d Cir. 1988).

F.2d 1114 (D.C. Cir. 1989); *West Penn Power Co. v. Environmental Protection Agency*, 860 F.2d 581 (3d Cir. 1988); *Winter v. Interstate Commerce Comm'n*, 851 F.2d 1056, 1062 (8th Cir.); *cert. denied*, 488 U.S. 925 (1988).[5] In *Chu v. INS*, the Ninth Circuit applied this rule in the context of deportation proceedings, concluding that there was "no principled basis upon which to distinguish Chu's case from *Locomotive Engineers* and its progeny." 875 F.2d at 781.

We disagree with the Ninth Circuit's conclusion. In *West Penn Power*, the Third Circuit began its analysis of the effect of a motion to reopen on an order of the EPA by observing that "[i]t makes sense to define 'finality' under the Clean Air Act in the same way that it is defined in administrative law generally." 860 F.2d at 854. It does not necessarily make sense, however, to define "finality" under the INA in the same way it is defined in administrative law generally. In fact, there are good reasons not to apply the *Locomotive Engineers* rule to deportation proceedings. That rule "basically rest[s] on a notion of judicial economy." *Arch Mineral Corp.*, 798 F.2 at 219. "It is obviously wasteful of the resources of the courts to burden them with objections to administrative action which may be obviated by agency action on reconsideration." *Id.; see also West Penn Power*, 860 F.2d at 585 ("allowing a petitioner to apply to both

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[5] In *Northside Sanitary Landfill, Inc. v. Thomas*, 804 F.2d 371 (7th Cir. 1986), this court held that the pendency of a motion to reopen or reconsider has no effect on an appellate court's jurisdiction. *Id.* at 378. That holding relied explicitly on the opinion of then-Judge Scalia in *American Trucking Ass'n. Inc. v. interstate Commerce Comm'n*, 697 F.2d 1146, 1148 n.* (D.C. Cir. 1983). The Supreme Court's decision in *Locomotive Engineers*, however, casts serious doubt on the continuing viability of *American Trucking* and its progeny. *West Penn Power*, 860 F.2d at 587. But we need not resolve this issue here, given our conclusion that the rule of *Locomotive Engineers* does not apply in the immigration context, whatever its effect on administrative law generally.

the court and the agency at the same time[] . . . could only lead to waste of resources on the part of the agency, the court, or both, without any countervailing benefit").

In the immigration context, however, efficient use of judicial resources is secondary to a different goal: preventing the use of "dilatory tactic[s] to postpone the execution of deportation orders." *Alleyne*, 879 F.2d at 1180; *see also Berroteran-Melendez v. INS*, 955 F.2d 1251, 1255 (9th Cir. 1992) (electing to exercise jurisdiction over appeal where petitioner filed motion to reopen *after* seeking appellate review, on ground that "the potential for abuse of the process to circumvent the BIA's discretionary power to grant or deny a stay of deportation pending a motion to reopen outweighs concerns with efficiency"). Application of the *Locomotive Engineers* rule on finality would "directly contravene" that goal. *Alleyne*, 879 F.2d at 1180. Under the INA, deportation is available only "[w]hen a *final order* of deportation under administrative processes is made against any alien." 8 U.S.C. § 1252(c) (emphasis added). Thus, if the filing of a motion to reopen or reconsider destroyed the finality of the Board's order, that motion might delay deportation so long as it was pending.[6] Moreover, under the Ninth Circuit's scheme an alien who filed such a motion within the statutory period for appeal could further delay deportation if the motion was denied by petitioning for judicial review both of the Board's initial order and of the denial of the motion, thereby obtaining an automatic stay of deportation. 8 U.S.C. § 1105a(a)(3). Such a result is

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[6] Such a result would also seem to conflict with INS regulations, which provide that "[t]he filing of a motion to reopen or a motion to reconsider shall not serve to stay the execution of any decisions made in the case." 8 C.F.R. § 3.8(a) (1988).

clearly contrary to Congress' intent in enacting the INA.[7] Finally, we note that the INS regulations providing for motions to reopen or reconsider do not seem to contemplate such a result. Rather, the regulations appear to assume that such motions may be pending at the same time the Board's order is being appealed:

> Motions to reopen or reconsider shall state whether the validity of the order has been *or is* the subject of any judicial proceeding.

8 C.F.R. § 103.5a (emphasis added). We conclude that the pendency of a motion to reopen or reconsider an order of deportation does not render the order nonfinal for purposes of this court's jurisdiction. We have jurisdiction over Zamora's case.

2. *Due Process*

Zamora contends that the Board deprived him of due process by failing to accord him a sufficiently individualized

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[7] In 1990, Congress amended section 1105a by adding a provision that recognizes the availability of motions to reopen or reconsider:

> [W]henever a petitioner seeks review of an order under this section, any review sought with respect to a motion to reopen or reconsider such an order shall be consolidated with review of the order.

8 U.S.C. § 1105a(a)(6) (1990 Supp.). The Eleventh Circuit has interpreted this provision as "follow[ing] the contours of the Ninth Circuit decisions" regarding the effect of a motion to reopen or reconsider on the finality of a Board order. *Fleary*, 950 F.2d at 713. This court, however, has concluded that the Eleventh Circuit's rule is "incompatible with the plain language of" the provision. *Akrap v. INS*, No. 91-2825, slip op. at 9 (7th Cir. June 26, 1992). Thus, the 1990 amendment to the INA actually supports our decision here.

determination of his claims. Zamora is certainly correct that the Board is required to "engage in a careful, individualized review of the evidence presented in [his] application[] and hearing[]." *Kaczmarczyk*, 933 F.2d at 595. Further, we agree with Zamora that the Board's disposition of these cases in three opinions employing identical, "boilerplate" paragraphs regarding the effect of the Nicaraguan election casts a cloud over the Board's decisions and hinders meaningful judicial review. We are also aware, however, tat "agency action is entitled to a presumption of regularity," so that "the burden is on the petitioner[] to convince us that the [Board] gave short shrift to the evidence [he] presented." *Id.* The Board's written decision, which describes in some detail Zamora's testimony regarding his alleged reasons for fearing persecution, demonstrates that the Board did consider Zamora's particular evidence, at least to a degree. Although the Board apparently based its decision solely on the change of government in Nicaragua, without any examination of how that change related to Zamora's particular claims, the Board's consideration of his case was not so deficient as to constitute a denial of due process.

Zamora also argues that he was deprived of due process because he was not given an opportunity to rebut the Board's conclusion as to the significance of the Nicaraguan elections. This argument is entirely without merit. In *Kaczmarczyk*, this court made clear that due process does not require the Board to give an asylum applicant the opportunity to rebut noticed facts prior to reaching a decision. Rather, we found that the mechanism of the motion to reopen, which "allows asylum petitioners an opportunity introduce evidence rebutting officially noticed facts," provides a sufficient opportunity to be heard to satisfy the requirements of due process. *Id.* at 597. *Accord Gutierrez-Rogue v. INS*, 954 F.2d 769, 773 (D.C. Cir. 1992); *Rivera-Cruz v. INS*, 948 F.2d 962, 968-69 (5th Cir. 1991),

rehearing denied, 954 F.2d 723 (1992). *But see Castillo-Villagra v. INS*, 1992 WL 172995 (9th Cir. July 27, 1992); *Ulloa v. INS*, 944 F.2d 905 (6th Cir. 1991) (unpublished disposition). *Cf. Wojcik v. INS*, 951 F.2d 172, 173 (8th Cir. 1991). As discussed above, Zamora has in fact filed such a motion. The Board did not deprive Zamora of his right to due process.[8]

3. *Substantial Evidence*

Zamora also contends that the Board's decision denying him asylum was not supported by substantial evidence because, contrary to the Board's assumption, the change in government in Nicaragua did not significantly diminish the ability of the Sandinistas to persecute him. He argues that the regime headed by President Violeta Chamorro is unstable and that the Sandinistas still wield significant power. This argument rests *entirely* on evidence that Zamora submitted in support of his motion to reopen and his motion to this court for leave to adduce additional evidence. None of this evidence was before the Board at the time it made its determination in Zamora's case. We will not weigh evidence that the Board has not previously considered; an appellate court is not the appropriate forum to engage in fact-finding in the first instance. *See*

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[8] We do note that in order for the motion to reopen procedure to satisfy the requirements of due process it must provide a "'*meaningful* opportunity to be heard.'" *Kaczmarczyk*, 933 F.2d at 595 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (emphasis added). Thus, as the D.C. Circuit recently recognized, it would raise a serious due process problem if the Board did not actually consider these motions but simply filed them away in some obscure nook or cranny until the petitioner in question could be deported. *See Gutierrez-Rogue*, 954 F.2d at 773. So far as we can tell from this record, however, this is not such a case; the Board's delay in deciding Zamora's motion does not seem attributable to any improper action by the Board. *See infra* p. 15.

Osaghae, 942 F.2d at 1162 ("we are not to take evidence and base our decision on some mixture of that evidence with the evidence that was before the Board"); *Rivera-Cruz v. INS*, 948 F.2d at 967 ("we cannot weigh evidence that has not been brought previously before the Board"); *Tejeda-Mata v. INS*, 626 F.2d 721, 726 (9th Cir. 1980), *cert. denied*, 456 U.S. 994 (1982) ("this Court does not sit as an administrative agency for the purpose of fact-finding in the first instance"). The evidence that *was* before the Board--that the Sandinistas had ceased to control the Nicaraguan government--tends to support its decision.

Nor will we order the Board to consider Zamora's new evidence, as he alternatively requests. In *Osaghae*, we held that "if the administrative record is inadequate because the Board has failed without justification to consider newly discovered evidence, we can remand for the creation of an adequate record" pursuant to 28 U.S.C. § 2347(c). 942 F.2d at 1162. Here, the fact that the Board has not yet decided Zamora's motion to reopen does not necessarily mean that the Board has "failed without justification" to consider Zamora's evidence with respect to the weakness of the Chamorro regime. A delay of more than a year in deciding a motion to reopen, while certainly significant, does not compel the conclusion that the Board has acted improperly. We can accept the INS's claim that the delay is a normal consequence of the INS's "staggering" caseload. Br. at 24. Further, we note that Zamora's petition to reopen was filed only one day before he petitioned for review in this court. Thus, the Board's delay may also be attributable to a decision not to waste limited resources resolving a motion that might well be rendered moot by this court.

The *Osaghae* ruling itself is limited to situations in which the Board "has acted improperly" in preventing an asylum petitioner from placing evidence before it. 942 F.2d at 1162.

By its own terms, however, section 2347 apparently permits us, as a matter of discretion, to remand to an agency for new evidence when two conditions are met: that the additional evidence is material, and that there were reasonable grounds for failure to adduce the evidence before the agency.[9] But whatever discretion we may have here we exercise in accordance with *Kaczmarczyk*, which found the reopening procedure to be an appropriate remedy for asylum petitioners seeking to rebut officially noticed facts.[10] Now that the present appeal has been resolved, we assume that the Board will fully address Zamora's motion in a timely fashion.[11]

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[9] 28 U.S.C. § 2347(c). Other circuits have held without reference to improper action that remand may in certain circumstances be appropriate. *See, e.g., Bernal-Garcia v. INS*, 852 F.2d 144 (5th Cir. 1988); *Becerra-Jimenez v. INS*, 829 F.2d 996 (10th Cir. 1987); *Martinez de Mendoza v. INS*, 567 F.2d 1222 (3d Cir. 1977).

[10] 933 F.2d at 597. *See also Ramirez-Gonzalez v. INS*, 695 F.2d 1208, 1213-14 (9th Cir. 1983) (refusing to remand under § 2347 and noting that the petitioner could have filed a motion to reopen); *Martinez de Mendoza v. INS*, 567 F.2d 1222, 1226 n.9 (3d Cir. 1977) ("[I]n normal circumstances a party asserting new and material evidence should, in the first instance, resort to [the reopening procedure] rather than invoking our power under § 2347(c).").

[11] We noted above that the filing of a motion to reopen does not automatically stay execution of a Board ruling. *See supra* n.6. As we observed in *Kaczmarczyk*, "[t]here thus exists the possibility that unsuccessful asylum applicants may be ordered to leave the country before the Board has ruled on their motions to reopen." 933 F.2d at 597. We therefore reiterate here our presumption that "when an asylum applicant uses a good faith motion to reopen to dispute officially noticed facts, the Board will exercise its discretion to stay the execution of its decision until it has had an opportunity to rule on the applicant's motion." *Id.; see also Gutierrez-Rogue*, 954 F.2d at 773 (adopting the same presumption).

B. *Luis Andres Esquivel-Berrios*

Like Zamora, petitioner Berrios argues that he was deprived of his right to due process because the Board failed to engage in sufficiently individualized consideration of his evidence. He also contends that the Board's finding that he does not have a well-founded fear of future persecution is not supported by substantial evidence for the same reason that Zamora alleges. Finally, Berrios argues that, even if the Board could reasonably conclude that he did not have a well-founded fear of future persecution, he was nonetheless entitled to asylum based on the severity of his *past* persecution.

1. *Due Process*

Again, we note the cloud cast over the Board's decision by its use of boilerplate paragraphs in describing the salient factors involved in its determination. In addition, the Board's written decision affirming the Immigration Judge's denial of Berrios' petition does not contain the sort of detailed description of Berrios' testimony that we saw in Zamora's case. Thus, it is less immediately apparent that the Board considered Berrios' evidence at all. Nevertheless, we find that the Board's decision contains sufficient indicia of individualized determination to satisfy due process. In particular, the Board notes Berrios' "testimony concerning the military round-up of young males, like himself, in Nicaragua." This statement indicates that the Board was aware of Berrios' specific claim. The Board also makes an explicit finding that the State Department's *Country Reports on Human Rights Practices* for the years 1984-1985 and 1987-1988, which Berrios claimed the Immigration Judge improperly prevented him from submitting, "do not establish his present eligibility for either withholding of deportation or asylum." Again, this finding suggests that the Board was at least aware of the particulars of Berrios' case. Although, as in Zamora's case, the Board did not discuss the relationship

between the change in the Nicaraguan government and Berrios' particular claims, the Board's consideration of Berrios' case was not so inadequate as to amount to a denial of due process.

2. *Substantial Evidence*

Like Zamora, Berrios also challenges the Board's finding that he did not have a well-founded fear of persecution based entirely on evidence as to the stability of the Chamorro regime that was not before the Board. As already noted, we will not consider such evidence for the first time on appeal. The Board's decision is supported by the evidence that was before it at the time it decided Berrios' case.[12] And Berrios' request that we remand to the Board with orders to consider his new evidence has even less basis than did Zamora's, since Berrios has never given the Board *any* opportunity to consider this evidence. Because the Board did not provide Berrios with an opportunity to rebut the noticed facts prior to deciding his case, Berrios has a due process right to have this evidence considered. *Kaczmarczyk*, 933 F.2d at 597. In order to do so, however, he must file a motion to reopen with the Board. *Id.*

We reject Berrios' argument that he is entitled to asylum based solely on the severity of his past persecution. In *Matter of Chen*, Interim Decision 3104 (BIA 1989), the Board held that where an asylum applicant has been subjected to especially severe persecution in the past, "humanitarian reasons" may

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[12] The Board noted in its decision that "the new president of Nicaragua has announced a general amnesty covering the hostilities between the former Contra resistance and the Nicaraguan government and an end to military conscription." This evidence, together with the broad observation that the Sandinistas no longer controlled the Nicaraguan government, certainly tends to support a conclusion that Berrios no longer had a well-founded fear of persecution based on his avoidance of conscription into the Sandinista military should he be returned to Nicaragua.

warrant the granting of asylum "even if there is little likelihood of future persecution." Berrios contends that his is such an extraordinary case because he fled Nicaragua in order to avoid forcible conscription into the Sandinista military at the age of twelve, a practice that violates "settled principles of United States and international law." Br. at 23. But the Board, which clearly was aware of the nature of Berrios' claim, found that Berrios had not established the sort of extreme persecution necessary to meet the *Chen* standard. Given that Berrios was never in fact forcibly conscripted, or even personally threatened with forced conscription, we do not think that the Board's conclusion was unsupported.

C. *Felipe Antonio Juresma-Altamirano and Luis Rodriguez-Altamirano*

The Altamirano brothers, like both Zamora and Berrios, argue that the Board failed to accord them a sufficiently individualized determination of their claims. Their argument, however, has more merit than does that of Zamora or Berrios. The Board's written opinion dismissing the Altamiranos' appeal is made up *entirely* of boilerplate; there is nothing in the opinion to suggest that the Board was even aware of the particular claims made by the Altamirano brothers. Every paragraph in the decision is identical to a paragraph in the Board's decisions regarding Zamora and Berrios. There is nothing individualized about the Board's analysis in this case. We agree with the Altamiranos that the Board's consideration of their case was so deficient as to deny them due process and therefore vacate the Board's decision and remand the case for additional proceedings consistent with this opinion. We assume that such proceedings will include an opportunity of the brothers to attempt to rebut the Board's conclusion as to the significance of the Nicaraguan elections.

The brothers also contend that the Board's conclusion that they did not have a well-founded fear of persecution given the change of government in Nicaragua is not supported by substantial evidence. They may well have a point--we are somewhat doubtful that a Board decision which demonstrates no awareness of the particular petitioner's claims could be supported by substantial evidence. Because we vacate the Board's decision on other grounds, however, we need not resolve this issue.

III. CONCLUSION

For the foregoing reasons, the petitions of Agustin Rhoa-Zamora and Luis Andres Esquivel-Berrios are denied; the petition of Felipe Antonio Juresma-Altamirano and Luis Rodriguez-Altamirano is granted, and the Board's decision is vacated and remanded for further proceedings consistent with this opinion. In addition, the petitioners' motions to adduce additional evidence pursuant to 28 U.S.C. § 2347(c) are denied. If the petitioners wish to present their new evidence to the Board, they should do so by way of a motion to reopen. Because such a motion implements a due process right, *Kaczmarczyk*, 933 F.2d at 597, it must be considered in good faith by the Board. *Supra* at 14 n.8. We admonish the Board to consider petitioners' motions in that light.

A true copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

File: A28 578 493 - Harlingen Date: January 17, 1991

In re: LUIS ANDRES ESQUIBEL-BERRIOS

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Craig B. Mousin, Esquire
Midwest Immigrant Rights Center
327 South LaSalle Street, Suite 1400
Chicago, Illinois 60604

ON BEHALF OF SERVICE:

John D. Carte
General Attorney

CHARGE:

Order: Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251(a)(2)] - Entered without inspection

APPLICATION: Asylum; withholding of deportation; voluntary departure

ORDER:

PER CURIAM. By oral decision dated September 29, 1988, an immigration judge found the respondent, a native and citizen of Nicaragua, deportable as charged, denied his applications for asylum, withholding of deportation, and voluntary departure. *See* sections 208(a) and 243(h) of the

Immigration and Nationality Act, respectively, 8 U.S.C. §§ 1158(a) and 1253(h); *see also* section 244(e) of the vAct, 8 U.S.C. § 1254(e). The respondent's asylum and withholding claims are based on a fear of conscription by the Sandinistas, who controlled the government at the time he departed Nicaragua. The appeal will be dismissed.

After careful review of the record, we find no basis to support the respondent's contention that he has a well-founded fear of persecution on account of one of the five grounds enumerated in section 208(a) of the Act or that he has established a claim of past persecution sufficient to merit a grant of asylum relief. *See* section 101(a)(42)(A) of the Act, 8 U.S.C. § 1101(a)(42)(A); 8 C.F.R. § 208.5; *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987); *M.A.* v. *INS*, 899 F.2d 304 (4th Cir. 1990) (*en banc*), *aff'g Matter of A-G-*, Interim Decision 3040 (BIA 1987); *Matter of Mogharrabi*, Interim Decision 3028 (BIA 1987); *Matter of Chen*, Interim Decision 3104 (BIA 1989).

In this regard, we take administrative notice that the Sandinista party no longer controls the Nicaraguan government.[1] Effective April 25, 1990, a new coalition

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[1] It is well established that administrative agencies and the courts may take judicial (or "administrative") notice of commonly known facts. *See Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292 (1937). Therefore, this Board may properly take administrative notice of changes in foreign governments. *See Kubon* v. *INS*, 913 F.2d 386 (7th Cir. 1990). *See, e.g., Matter of Chen*, Interim Decision 3104 (BIA 1989); *Matter of Stojkovic*, 10 I&N Dec. 281 (BIA 1963). *See also Third Nat. Bank in Nashville* v. *Impac Limited, Inc.*, 432 U.S. 312, 317 (1977); *United States* v. *Reynolds*, 345 U.S. 1, 10 (1953); *Schulte* v. *Gangi*, 328 U.S. 108, 120 (1946); *United States* v. *Berrojo*, 628 F.2d 368 (5th Cir. 1980); *First Nat. Bank of Chicago* v. *Material Serv. Corp.*, 544 F.2d 911, 916 (7th Cir. 1976); *Spillway Marina, Inc.* v. *United States*, 445 F.2d 876, 878 (10th Cir. 1971). *See generally* 4 Stein, Administrative Law, § 2501 (1986).

government, formed by parties in opposition to the Sandinistas ("UNO"), has succeeded the former government of the Sandinista party following national elections and the inauguration of Violeta Chamorro as the new president. Further, the new president of Nicaragua has announced a general amnesty covering the hostilities between the former Contra resistance and the Nicaraguan government and an end to military conscription.[2] Given that the Sandinista party no longer governs Nicaragua, under the present circumstances we do not find that the record now before us supports a finding that the respondent has a well-founded fear of persecution by the Sandinista government were he to return to Nicaragua.

Further, even if one were to assume that the respondent's previous experiences in Nicaragua amounted to past persecution, or that at the time he left and for some time thereafter he had a well-founded fear of persecution should he return, it is not established that he presently merits a grant of asylum. In *Matter of Chen, supra*, we stated that in certain circumstances past persecution alone might warrant a grant of asylum even if there was no reasonable likelihood of present persecution. For instances, asylum could be granted if the past persecution had been so severe that return to the country of persecution would be inhumane. Even if past persecution had been established in the instant case, we would not conclude from our independent review of the record that there are humanitarian or compelling bases that presently warrant a grant of asylum.

Inasmuch as the respondent has failed to satisfy the lower burden of proof required for asylum, it follows that he also has

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[2] *See, e.g.*, Violeta Chamorro's inaugural address, as reported in *Chamorro Takes Nicaraguan Helm; Hails New Era*, New York Times, April 26, 1990, at A1.

failed to satisfy the clear probability standard of eligibility required for withholding of deportation. *See INS* v. *Stevic*, 467 U.S. 407 (1984). The evidence does not establish that if he were now to return to Nicaragua that it is more likely than not that he would be subject to persecution on account of one of the five grounds specified in section 243(h) of the Act.

On a related point, the respondent contends the immigration judge erred in denying his motion for a continuance of the September 28, 1988, hearing, sought for the two-fold purpose of affording the respondent's former counsel the opportunity to review the State Department's *Country Reports on Human Rights Practices* ("Country Reports") and to introduce any appropriate evidence found therein into the record. On appeal, the respondent, through newly-retained counsel, argues the Country Reports corroborate his testimony concerning the military round-up of young males, like himself, in Nicaragua and establish his eligibility for withholding of deportation. Hence, he claims, the immigration judge's decision to deny his continuance motion prejudiced his case. We do not agree inasmuch as "good cause" to postpone the hearing for additional attorney preparation has not been shown. *See* 8 C.F.R. §§ 3.27, 242.13 (1990); *see also Matter of Perez*, Interim Decision 3025 (BIA 1987); *Matter of Namio*, 14 I&N Dec. 412 (BIA 1973); *Matter of Sibrun*, 18 I&N Dec. 354 (BIA 1983). No explanation has been provided as to the reasons for counsel's failure to review the Country Reports prior to the September 28, 1988, hearing. We note former counsel entered his appearance in the matter as early as 6 weeks prior to the September hearing. Furthermore, the respondent has failed to show he was prejudiced by the immigrant judge's handling of the case. *See Matter of Perez, supra; Matter of Santos*, Interim Decision 2969 (BIA 1984). For the reasons set forth above, the Country Reports for years 1984-1985 and 1987-1988, which the respondent claims he was prevented from submitting below and

which he now submits on appeal, do not establish his present eligibility for either withholding of deportation or asylum. *See M.A.* v. *INS, supra; Matter of Chen, supra.*

Finally, as with all forms of discretionary relief, it is the alien who bears the burden of proving he is eligible for the privilege of voluntary departure. On appeal, the respondent argues he does not have a criminal record and is a person of good moral character. Hence, he submits, he is eligible for voluntary departure. While the respondent's good moral character and lack of criminal record are factors germane to the determination of whether he is eligible for voluntary departure, he has failed to substantiate these claims on the record before us. Section 244(e) of the Act; 8 C.F.R. § 244.1 (1990). Although the respondent claims to have stated in his asylum application that he has never been convicted or sentenced for a crime, we are unable to find such a statement in the record. *See generally Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Moreover, in order to establish his eligibility for the relief he now seeks, the respondent must also show that he is willing and able to depart the United States voluntarily in lieu of deportation at his own expense. 8 C.F.R. § 244.1 (1990). No such showing, however, has been made. Therefore, the respondent has failed to sustain his burden, which is his alone, of proving his statutory eligibility for the privilege of voluntary departure.

Accordingly, the appeal is dismissed.

FOR THE BOARD

DANIEL FELIX ULLOA, Petitioner, v. IMMIGRATION AND NATURALIZATION SERVICE, Respondent

No. 91-3028

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

1991 U.S. App. LEXIS 22288
944 F.2d 905 (Table)

September 17, 1991, Filed

On appeal from the Board of Immigration Appeals; A28 704 546.

JUDGES: Nelson and Suhrheinrich, Circuit Judges; and James Harvey*, Senior District Judge.

OPINION BY: PER CURIAM

OPINION: Petitioner Daniel Ulloa, a citizen of Nicaragua, petitions for review of a decision of the Board of Immigration Appeals ("Board") denying his request for asylum and withholding of deportation. For the reasons stated below, we remand for additional proceedings consistent with this opinion.

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* The Honorable James Harvey, United States Senior District Judge for the Eastern District of Michigan, sitting by designation.

I.

Ulloa entered the United States on March 10, 1985, at Miami, Florida, as a non-immigrant visitor. He remained in the United States after the expiration date of his visitor's visa. The Immigration and Naturalization Service ("INS") ordered petitioner to show cause why he should not be deported pursuant to section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(2). Petitioner conceded deportability and applied for asylum or withholding of deportation based upon his past experiences with and fear of future persecution from the Sandinista government of Nicaragua.

On December 11, 1989 the Immigration Judge ("IJ") found petitioner to be deportable as charged, but granted his application for asylum and withholding of deportation. The INS appealed to the Board. On December 11, 1990 the Board affirmed the IJ's determination of deportability, but reversed the grant of asylum and withholding of deportation. The Board first noted that the IJ had not found that petitioner was the subject of "past persecution" in Nicaragua. The Board also independently concluded that petitioner had failed to show he was the victim of "past persecution." The Board then took administrative notice of the fact that the Sandinista government no longer controlled Nicaragua because of the April 25, 1990 election of Violeta Chamorro's new coalition government. The Board determined that petitioner could not suffer persecution under the new Chamorro government because the new government granted a general amnesty to the Contras and ended military conscription. The Board therefore concluded that this change in government eliminated petitioner's "fear of future persecution" in Nicaragua, and reversed the IJ's decision. The Board granted petitioner 30 days to voluntarily depart the United States. This appeal followed.

II.

Petitioner contends that the Board improperly took administrative notice of the change in Nicaragua's government without affording him notice and an opportunity to introduce evidence that the Sandinistas still control much of the government, including the military.

We agree with the recent decision in *Kaczmarczyk v. INS*, 933 F.2d 588, 593-95 (7th Cir. 1991) that the Board may properly take administrative notice of, and base its decision on, a change in the political climate of an alien's native country. However, unlike *Kaczmarczyk*, where the Board's administratively noticed facts simply supplemented the IJ's factual findings and conclusions, the Board here reversed the IJ's decision based on the administratively noticed facts. This reversal of the IJ's grant of asylum and withholding of deportation occurred without either prior notice or affording petitioner an opportunity to present rebuttal evidence.

It is well established that aliens are entitled to notice and an opportunity to be heard in deportation proceedings. *See Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982); *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950). When an administrative agency takes official notice of facts that "could be reasonably challenged and they importantly affect the decision, giving the parties a pre-decision chance to respond to them may be an essential part of fair procedure." *Banks v. Schweiker*, 654 F.2d 637, 642 n.11 (9th Cir. 1981) (quoting 3 K. Davis, *Administrative Law Treatise*, § 15:6 at 195-96 (2d ed. 1980)). "Such fairness concerns appear to have motivated the drafters of Federal Rule of Evidence 201(e), which provides litigants in federal court just such an opportunity rebut judicially noticed facts." *Kaczmarczyk*, 933 F.2d at 596. We believe similar notions of fairness require that the Board give aliens adequate notice and a meaningful opportunity to respond to

officially noticed facts that bear upon the Board's decision-making process. While our scope of review over deportation proceedings is narrow, "it extends at least to a determination as to whether the procedure followed by the Board in a particular case constitutes an improper exercise of discretion." *Ravancho v. INS*, 658 F.2d 169, 176 (3d Cir. 1981) (remanding case to the Board due to Board's failure to consider all relevant evidence offered by petitioner).

We conclude that the procedure followed by the Board in the present case was an improper exercise of discretion because it denied the petitioner any meaningful opportunity to present rebuttal evidence.[1] Consequently, we REMAND this case so that petitioner may offer rebuttal evidence regarding the change of governments in Nicaragua and STAY the order of deportation until such evidence has been considered by the Board.

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[1] The INS contends that petitioner may present rebuttal evidence in a motion to reopen his case pursuant to 8 C.F.R. § 3.2. In our view, requiring a petitioner facing deportation to file a motion to reopen the proceedings in order to rebut officially noticed facts creates an unnecessary procedural hurdle for such a petitioner. The filing of a motion to reopen does not serve to stay the execution of an order of deportation, see 8 C.F.R. § 3.8(a), and thus such a procedure imposes the unreasonable risk that a petitioner may be deported before the Board considers the rebuttal evidence contained in his motion to reopen. *Cf. Kaczmarczyk*, 933 F.2d at 597 n.9.

Title 28, United States Code, Section 2347

Insofar as relevant, 28 U.S.C. § 2347 provides:

"(c) If a party to a proceeding to review applies to the court of appeals in which the proceeding is pending for leave to adduce additional evidence and shows to the satisfaction of the court that--

> (1) the additional evidence is material; and
>
> (2) there were reasonable grounds for failure to adduce the evidence before the agency;

the court may order the additional evidence and any counter evidence the opposite party desires to offer to be taken by the agency. The agency may modify its findings of fact, or make new findings, by reason of the additional evidence so taken, and may modify or set aside its order, and shall file in the court the additional evidence, the modified findings or new findings, and the modified order or the order setting aside the original order."